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No. 01-172

IN THE

Supreme Court of the United States

BIOMET, INC.,

Petitioner,

v.

DR. RAYMOND G. TRONZO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* AND BRIEF OF PAST PRESIDENTS OF THE FEDERAL CIRCUIT BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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BIOMET, INC.,

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DR. RAYMOND G. TRONZO,

Respondent.

On Petition For Writ Of Certiorari

To the United States Court of Appeals

for the Federal Circuit

MOTION OF PAST PRESIDENTS OF THE FEDERAL CIRCUIT BAR ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE*

Past Presidents of the Federal Circuit Bar Association hereby request, pursuant to Rule 37 of the Rules of this Court, leave to file the accompanying brief as *amici curiae* in support of the Petitioner. The issues to be decided herein affect the interests of *amici*, as set forth in the accompanying brief.

The *amici* obtained the consent of the Petitioner Biomet, Inc., and this letter of consent has been filed with the Clerk of the Court. Respondent Raymond G. Tronzo has not responded to *amici's* repeated requests for consent to the submission of this brief in support of the Petition for Writ of Certiorari.

For the foregoing reasons, the Motion of the Past Presidents of the Federal Circuit Bar Association for Leave to File a Brief as *Amici Curiae* in support of the Petitioner should be granted.

Respectfully submitted,

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Dated: August 27, 2001

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BRIEF FOR PAST PRESIDENTS OF THE FEDERAL CIRCUIT BAR ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICI CURIAE[1]

The *Amici Curiae* are five Past Presidents of the Federal Circuit Bar Association.[2] The Federal Circuit Bar Association, http://www.fedcirbar.org/, is a national organization of about 2,400 lawyers who practice before the United States Court of Appeals for the Federal Circuit.[3] *Amici* are active lawyers who continue to practice before the Federal Circuit and the district courts subject to its jurisdiction.

These Past Presidents, acting in their personal capacities, are filing this Amicus Brief on their own behalf because the decision below significantly affects the practice and procedure before the Federal Circuit and lower tribunals throughout the country whose decisions are appealed to the Federal Circuit. The new Federal Circuit surprise holding, regarding the effect of its mandate, also affects cases that may arise in state court, because state tribunals may decide to announce, in any case before them, that this new rule is a procedural bar to challenging the unconstitutionality of punitive damage ratios.

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[1] Pursuant to Supreme Court Rule 37.6, *Amici* state that none of the parties or their counsel authored this brief in whole or in part, and no person or entity other than *Amici* or counsel made any monetary contribution to the preparation or submission of the brief. Furthermore, pursuant to Supreme Court Rule 37.1, *Amici* refrain from reiterating points argued by Petitioner. In particular, *Amici* do not analyze the conflicts between *Tronzo II*, and other federal courts, although *Amici* agree with Petitioner's conclusion that there is a substantial conflict.

[2] Michael E. Dergosits, Roy E. Hofer, Jerald S. Howe, Jr., Ronald L. Smith, and Robert D. Wallick.

[3] The Association is an affiliated organization with the American Bar Association. The Association's leadership comes from all areas of the country and represents all areas of the Court's jurisdiction.

SUMMARY OF THE ARGUMENT

The Federal Circuit, in the words of Respondent, held that "a finding of tort liability alone is sufficient to support an award of punitive damages, even in the absence of nominal or compensatory damages,"[4] and that the appellate court may "affirm an award of punitive damages along with affirming tort liability, without regard to the amount of compensatory damages to be awarded on remand."[5] The Court should grant certiorari because that holding — affirming punitive damages without any judicial review of the ratio between punitives and compensatories — flies in the face of the due process principle articulated in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and related cases.

This decision invades substantive constitutional rights because it undermines the procedural protections of judicial review that the Supreme Court found so crucial in *Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. 415, 420 (1994) ("the availability of both 'meaningful and adequate review by the trial court' and subsequent appellate review" is constitutionally necessary); *id.* at 421 ("'procedural due process' requires judicial review of punitive damages awards for reasonableness.'") (quoting Scalia, J., joined by Thomas, J., concurring in the judgment in *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 471 (1993)). This issue has importance far beyond the Federal Circuit because one or more other Courts of Appeal may adopt this new procedural rule announced for the first time by the Federal Circuit in this case. The decision below also affects the practice and procedure in the lower federal courts, no matter to which circuit appeal would lie.

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[4] Response of Plaintiff-Appellant to Defendant-Appellee's Petition for Rehearing, *Tronzo II*, at 9-10 (emphasis in original).

[5] Response of Plaintiff-Appellant to Defendant-Appellee's Petition for Rehearing, *Tronzo II*, at 9-10 (emphasis added).

The Federal Circuit created a new and surprising procedural rule, not reasonably anticipated by prior law, and this rule imposes an inhospitable forum to the assertion of important constitutional rights. In particular, the Federal Circuit changed the rules governing the effect of a mandate, so that the Federal Circuit now holds that a mandate forecloses not only the legal arguments that were decided (either expressly or by implication) or could have been decided in the prior appeal, but also forecloses a legal argument that could not have been raised at the time of the first appeal, because the factual predicate did not then exist and might not ever exist. Federal courts, like state courts, may not create surprise procedural rules that are not fairly anticipated from prior law when the result is to bar consideration of the merits of a constitutional claim.

In this case, the trial court, after conducting the hearing on damages required by *Tronzo I*, reduced compensatory damages from $7.13 million to $520; the trial court then reduced the punitive damages from $20 million (a ratio of 2.8 times the compensatories) to $52,000 (a ratio of 100 times the new compensatories), because the ratio of the original punitives to the new compensatories, violated due process "without question." *Tronzo* v. *Biomet, Inc.*, No. 91-8175-CIV, 1999 U.S. Dist. LEXIS 22433, at *9 (S.D. Fla. Aug. 27, 1999). *Tronzo II* held that when the Federal Circuit earlier vacated the judgment because of error in the award of compensatory damages, the mandate forbade the district court from determining the constitutionality of the punitive damage award in light of the new punitive/compensatory ratio. The Federal Circuit treated the ratio issue as ripe as of the time of the first appeal, before the compensatory damages were fixed. However, one cannot determine the ratio unless one first knows the divisor.

Federal courts, because of the "case or controversy" requirement of Article III and prudential rules of self-restraint, may not consider the question whether punitive damages bear

an unconstitutionally excessive ratio to the compensatory damages until that issue is ripe. The Federal Circuit, in *Tronzo I*, could not know what that ratio might be, because the compensatories could not be determined until after a remand and hearing before the trial court. Yet, *Tronzo II* ruled that its earlier mandate foreclosed consideration of this ratio issue, even though that issue was not ripe in *Tronzo I* because the factual predicate did not yet exist.

ARGUMENT

I. THE FEDERAL CIRCUIT HAS CREATED A SURPRISE PROCEDURAL RULING THAT PROVIDES AN INHOSPITABLE FORUM TO THE ASSERTION OF FEDERAL CONSTITUTIONAL RIGHTS.

The Court of Appeals, in *Tronzo II*, created a new rule that could not be anticipated from prior rulings in the Federal Circuit. The result of this ruling, not well grounded in the prior law, is to create a surprise procedural bar to the vindication of important federal constitutional rights.

The basic question is this: How does one complain that punitive damages are an unconstitutionally excessive multiple of compensatory damages—how does one raise this ratio issue—before one knows what the compensatory damages are?[6]

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[6] The Petitioner implicitly reserved the right to raise the ratio issue if, after the remand, the factual predicate came into being. In fact, the Petitioner twice stated that the punitive award was directly tied to the compensatory award, noting (in identical language) that if the then-existing compensatory award was overturned, then Respondent "can recover neither the compensatory damages nor the punitive damages." *Tronzo I*, Biomet Brief, at 42, n.9; *Tronzo I*, Biomet Reply Brief at 23-24 n.16. Of course, at that time, no one could specifically argue that the punitives were unconstitutional because they were 38,000 times more than the compensatories, for the simple reason that, at the time of *Tronzo I*, the

Tronzo II's new mandate rule creates a Catch-22 procedural bar for parties who object to punitive damages on the grounds that the ratio between punitives and compensatories is grossly disproportionate. Before the mandate in *Tronzo I*, this ratio argument did not exist and so could not be raised; after the mandate and new hearing, the ratio argument finally came into being, but could not be raised because it was foreclosed by the mandate: Catch-22.

It is important to realize what is not at issue in this case. The general rule is that the mandate from the court of appeals forecloses: (1) the legal issues that the appellate court decided expressly; (2) the legal issues that the appellate court decided by necessary implication; and (3) the legal issues that could have been raised in the appeal but were not raised. What *Tronzo II* adds to this litany — and this is the crux of the case — is a new and unexpected mandate foreclosure rule: it provides that the mandate forecloses a legal argument (the ratio issue) that could not have been raised at the time of the first appeal, because the factual predicate (the excessive ratio) did not then exist and might not ever exist.

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punitives were only 2.8 times the compensatories. Nor could the Federal Circuit, in *Tronzo I*, rule on whether the 38,000 ratio was unconstitutional, because no one knew before the hearing that the ratio, after the new hearing, would be 38,000 times the compensatories. Consequently, this is not a case where petitioner, in *Tronzo I*, waived the right to object to the punitive damage ratio.

Moreover, the standard principle is that a waiver is a "voluntary relinquishment of some known right," *e.g.*, *Hicks* v. *Talbott Recovery Sys.*, 196 F.3d 1226, 1238 (11th Cir. 1999); *Rush* v. *United States*, 33 Ct. Cl. 417, 1898 U.S. Ct. Cl. LEXIS 44, at *12 (Ct. Cl. May 23, 1898) ("waiver must be a voluntary relinquishment of a known right"). One normally waives by saying that one waives the right. Hence, respondent and the Federal Circuit must be arguing that petitioners "forfeited" the right to challenge the punitives. But that argument merely raises (and does not answer) the question of why the law should provide that a litigant has "forfeited" the right to object to punitives as an excessive multiple of compensatories at a time when the factual predicate for that argument does not exist, and might never exist.

The Federal Circuit confused two different points that the trial court correctly distinguished. The mandate may have foreclosed Petitioner from challenging Respondent's entitlement to some punitive damages, but not the constitutional excessiveness, i.e., the ratio, because that issue could not arise until after the trial court reduced the compensatory damage award to $520.[7]

Punitives are not, in a constitutional sense, grossly disproportionate to compensatory damages when the ratio is 2.8 to 1, which was ratio at the time the mandate issued in *Tronzo I*. After remand and a new hearing, the trial court reduced the compensatory damages, so that the ratio between the new compensatory damages and the old punitive damages became 38,000 to 1. One could not know, before the hearing, that this new ratio would come into being. (If one would know that, there would be no need to order a hearing.) Only when the ratio changed to 38,000 to 1 did a new issue arise: whether the punitives were unconstitutionally disproportionate to the compensatories. Yet, at the very point where the ratio argument becomes ripe, *Tronzo II* holds that it is barred, because it came too late.

In other words, one cannot attack a punitive damage award on the particular ground that it is grossly disproportionate to the compensatory damages unless one first knows what the compensatory damages are. When *Tronzo I* issued its mandate, the punitives were 2.8 to 1, and the ratio was not constitutionally disproportionate. After remand, when the trial court conducted a new hearing in light of the mandate, the trial court reduced the damages from over $7 million to $520, so the new ratio became 38,000 to 1. *Tronzo II* then

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[7] *Tronzo* v. *Biomet, Inc.*, 1999 U.S. Dist. LEXIS 22433, at *4. If the trial court had taken new evidence (as the mandate allowed), the jury could have decided the factual questions, pursuant to the dictates of the Seventh Amendment, and that jury would have decided both the compensatory damages and the punitive damages.

created an unanticipated procedural hurdle to challenge punitives, holding, in effect, that one cannot challenge the punitive ratio after remand unless one had first challenged the ratio prior to remand, at a time when the ratio was not unconstitutional.

This procedural obstacle, which was not reasonably foreseen, is analogous to the unforeseen procedural obstacle that the Court invalidated in *Reich* v. *Collins*, 513 U.S. 106 (1994). In 1989, the Supreme Court declared unconstitutional a Georgia law that that imposed state income taxes on federal retirement benefits but not on state retirement benefits. 513 U.S. at 108. The following year, Reich, a retired federal military officer and Georgia taxpayer, sued in state court for a refund of taxes paid pursuant to this unconstitutional statute. *Id.* The Georgia Supreme Court denied a refund, arguing that Reich only had a predeprivation remedy; he should have withheld the contested tax assessments and sued before paying them. *Id.* at 110. The unanimous Court, in *Reich*, reversed. *Id.* at 114. Due process allows a state to have a special procedure, such as an exclusively predeprivation remedy, as long as it is "clear and certain." *Id.* at 110-11. Or, the state could provide an exclusively postdeprivation process, or a hybrid, or change the remedial scheme over time. *Id.* at 111. "But what a State may not do, and what Georgia did here, is to reconfigure its scheme, unfairly, in midcourse . . . ." *Id.* The Court examined prior Georgia procedures on remedies and concluded that "no reasonable taxpayer would have thought that they represented, in light of the apparent applicability of the refund statute, the exclusive remedy for unlawful taxes." *Id.*

That is also true here. Even the trial judge did not know of this new mandate rule that prevented him from considering the constitutionality of the punitive damage ratio. The trial judge, who was intimately familiar with the case, did not think that the mandate decided an issue that did not (and could not) exist until after his hearing, when the compensatory damages

were substantially reduced. This fact is reflected not only in his actions (he interpreted the mandate to allow him to apply *BMW* and interpreted *BMW* to require him reduce the punitives) but also in his express ruling that "the due process issue regarding the $20 million punitive award did not come into being until this court entered its award reducing the compensatory damage award to $520. Biomet could not have waived, and this court could not have considered, the excessiveness issue before the compensatory award was reduced." *Tronzo* v. *Biomet, Inc.*, 1999 U.S. Dist. LEXIS 22433, at *4.[8]

Hence, in light of *BMW*, the trial judge reduced the punitives from a ratio of 38,000 to 1 to a ratio of 100 to 1.[9] This amount, $52,000, is hardly miserly or parsimonious; indeed, *BMW* noted that the Justices in the past have expressed concern that even a ratio of more than 4 to 1 "might be 'close to the line,' [but] it did not 'cross the line into the area of constitutional impropriety.'"[10]

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[8] Petitioner is "foreclosed from challenging Dr. Tronzo's entitlement to punitive damages, [but not] the issue of constitutional excessiveness [because that] did not arise until the court reduced the compensatory damage award to $520." 1999 U.S. Dist. LEXIS 22433, at *4.

[9] The trial court applied *BMW* and held: "without question the $20 million punitive award in this case does not bear a reasonable relationship to the $520 compensatory award and, therefore, it must be reduced." 1999 U.S. Dist. LEXIS 22433, at *9.

[10] *BMW*, 517 U.S. at 581 (quoting *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 23-24 (1991)). *BMW* also noted that even though the majority in *Silkwood* v. *Kerr-McGee Corp.* did not address the size of the punitive damage award, Justice Blackmun, joined by Justice Marshall, dissenting, "commented on its excessive character, noting that the '$10 million [punitive damages award] that the jury imposed is 100 times greater than the maximum fine that may be imposed . . . for a single violation of federal standards' and 'more than 10 times greater than the largest single fine that the Commission has ever imposed.'" *Id.* at 584 (quoting *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 263 (1984) (Blackmun, J., dissenting, joined by Marshall, J.)).

Reich is an example of the rule requiring "adequate and independent" state grounds before a court can use a procedural rule to bar consideration of a federal claim. Under this principle, "in order that the constitutional mandate may not become a dead letter," the federal court conducts its own independent "appraisal" of the state case law and rules ("we are bound to decide for ourselves") to see if the state ruling on procedure came as a surprise or is fairly grounded in prior law. *Indiana ex rel. Anderson* v. *Brand*, 303 U.S. 95, 100 (1938).

Yet, there is no reason why this principle must be limited to state courts. Lower federal courts, no less than state courts, are not supposed to provide an inhospitable forum for the vindication of federal rights. No federal court, creating a new procedural rule that is neither well grounded nor reasonably anticipated in the prior case law, should be able to preclude a litigant from raising a substantial federal constitutional claim.

That is what happened here. The Federal Circuit has promulgated a rule that gives its mandates a broader preclusive effect than the mandates from other courts of appeals. Similarly, there is no prior case law in the Federal Circuit that provides that the mandate precludes the lower court from considering issues that could not have been raised in the appeal because they were not yet ripe; the argument that the punitives were unconstitutional because of the excessive ratio to the compensatory damages is an argument that could not come into being unless the trial court, after the mandate issues, first finds that the compensatory damages must be substantially reduced.

This Court has warned that "[j]udicial review of the amount [of punitive damages] awarded" is an important procedural safeguard given the fact that "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda*

Motor Co., Ltd. v. *Oberg*, 512 U.S. 415, 432 (1994).[11] In this case, the Federal Circuit's new mandate rule — imposed, not by changing the appellate rules after notice and comment, but as a surprise in the very first case that raised the issue — turns that principle on its head. If this procedural surprise is permissible, we may expect to see some state courts adopting similar procedural surprises and thus undermining the procedural protections so important when dealing with punitive damages.

Consider the case where a criminal defendant appeals his conviction on an issue, and the appellate court orders a remand for a new trial. Let us assume that the defendant is again convicted and his new appellate lawyer argues that defendant's second trial lawyer acted so incompetently that his representation violated the defendant's right to competent counsel. We would not expect the trial or appellate court to rule that arguing this new issue was contrary to the mandate because it should have been raised earlier: it could not have been raised earlier because it did not exist earlier. So, too, with the argument that the punitive ratio was too disproportionate to the compensatory damages; the ratio was not excessively disproportionate until after the trial court's decision, after the hearing and ruling on remand, to change the compensatories.

The mandate rule in this case may be compared to a similar procedural rule, "the law of the case," which states, in general, that the decision, judgment, or rulings on the former appeal become the "law of the case," and the court will refuse to

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[11] The importance of procedural safeguards explains *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001). Stevens, J., for the Court, held that the court of appeals should apply a de novo standard of review (rather than the less-demanding, "abuse of discretion" standard) when reviewing the district court's determination of the constitutionality of punitive damage awards. *Id.* at 1689.

reopen what has been decided as between the parties.[12] The Supreme Court most recently considered the preclusive effect of "law of the case" in *United States* v. *Hatter*, where the Court held that the Compensation Clause of Article III prevents the Government from collecting Social Security taxes (but not Medicare taxes) from federal judges who held office before Congress extended those taxes to federal employees. 121 S. Ct. 1782, 1797 (2001). The Respondents argued that the "law of the case" doctrine prevented the Court from considering the scope of the Compensation Clause because "the Government presented that same question in its petition from the Court of Appeals' earlier ruling on liability," and the Supreme Court's earlier denial of that petition for lack of a quorum had the "same effect as" an affirmance "by an equally divided court." *Id.* at 1789 (quoting 28 U.S.C. § 2109). Respondents then argued that the "affirmance by an equally divided Court is 'conclusive and binding upon the parties as respects that controversy.'" *Id.* (citing *United States* v. *Pink*, 315 U.S. 203, 216 (1942)).

Hatter rejected that argument because "The law of the case doctrine presumes a hearing on the merits." *Id.* at 1790. In *Hatter*, there had been no previous consideration of the merits, so "law of the case" was inapplicable.

Similarly, in the instant case, the Federal Circuit, at the time of *Tronzo I*, could not consider the merits of an issue that did not yet exist — the punitive/compensatory ratio — at a time when the amount of compensatories was unknown, because the amount would only be determined after remand and a hearing.

Assume that defendant moves to dismiss a portion of plaintiff's cause of action because it is based on an allegedly unconstitutional statute. The state trial court refuses to grant

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[12] In *Tronzo II*, the Federal Circuit noted the relationship between the mandate rule and the "law of the case." 236 F.3d at 1348.

the motion, and the defendant files an interlocutory appeal. The state supreme court rules against defendant and remands for trial. Assume further that this Court does not review the case at this point because there is no final judgment. After trial, defendant then appeals again to the state supreme court, which refuses to reach the federal issue because of the procedural bar, "law of the case," caused by its decision in the earlier case. Defendant would not be foreclosed from review in the this Court because it never had the opportunity to decide the question on the merits.

For similar reasons, the Federal Circuit never had the opportunity to rule on the merits of a question that could only be raised for the first time at the trial level, after the remand and hearing in *Tronzo I*. Under the Federal Circuit's original mandate, the trial court also never had an opportunity to rule on the constitutionality of the punitive/compensatory ratio, for the simple reason that no one knew what the ratio would be until after the hearing following *Tronzo I*.

II. FEDERAL COURTS, BECAUSE OF THE "CASE OR CONTROVERSY" REQUIREMENT OF ARTICLE III, AND BECAUSE OF PRUDENTIAL SELF-RESTRAINT MAY NOT DECIDE A CONSTITUTIONAL ISSUE IF THE MATTER IS PREMATURE OR NOT RIPE

Just as a case can be brought too late, and thereby be moot, it can be brought too early, and not yet be ripe for adjudication. Because of the "case or controversy" requirement in Article III, augmented by the principle of judicial self-restraint, federal courts may not decide legal issues that are not yet ripe. Until the controversy becomes concrete and focused, it is difficult for the Court to evaluate the practical merits of the position of each party. In the case of the punitive to compensatory ratio, it should be clear that this ratio question is not ripe until one first knows what the ratio is. In *Tronzo I*, the Federal Circuit could not know what

the ratio would be, because it would not be determined until there was a remand and hearing in the trial court.

Consider, for example, *Int'l Longshoremen's & Warehousemen's Union, Local 37* v. *Boyd*, 347 U.S. 222 (1954). Appellants (the union and several alien members) sued to enjoin INS officials from construing § 212(d)(7) of the Immigration and Nationality Act to treat aliens domiciled in the continental United States returning from temporary work in Alaska as if they were aliens entering the United States for the first time. *Id.* at 222-23. Appellants also argued if the statute meant that, it would be unconstitutional. *Id.* at 223. It was stipulated that the union had over 3,000 members who work every summer in the herring and salmon canneries of Alaska, that some of these are aliens, and that if alien workers going to Alaska for the 1953 canning season were excluded on their return, their "contract and property rights [would] be jeopardized and forfeited." *Id.*

The Supreme Court held (7 to 2)[13] that the lower court should not have reached the statutory and constitutional questions because they were not yet ripe:

> Appellants in effect asked the District Court to rule that a statute the sanctions of which had not been set in motion against individuals on whose behalf relief was sought, because an occasion for doing so had not arisen, would not be applied to them if in the future such a contingency should arise. That is not a lawsuit to enforce a right; it is an endeavor to obtain a court's assurance that a statute does not govern hypothetical situations that may or may not make the challenged statute applicable. Determination of the scope and constitutionality of

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[13] Only Justice Black, joined by Justice Douglas, dissented, but they agreed with the principle: "Of course federal courts do not pass on the meaning or constitutionality of statutes as they might be thought to govern mere 'hypothetical situations.'" 347 U.S. at 224 (Black, J., joined by Douglas, J., dissenting).

> legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.

Id. at 223-24.

This ripeness principle is directly analogous to this case. The Federal Circuit's new mandate rule requires petitioners to ask the Federal Circuit to rule (at the time it decided *Tronzo I*) that, if a certain occasion that has not yet arisen and may never arise, does arise (i.e., if compensatories are lowered a certain amount after a new hearing following the remand, and if the case is not settled), then punitive damages would be unconstitutional if the lower court decided, after a hearing, that compensatories were $X, but the punitives would be constitutional if the hearing determines that compensatories were $ X+1, after taking into account the lower court's rationale (which it had not yet articulated) and the other evidence that the lower court might decide is relevant and useful. To paraphrase *Boyd*, "Determination of the scope and constitutionality of [the punitive damages ratio] in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function." See *id.* at 224.

If one has to argue every "contingent" argument on appeal, e.g. if compensatories are cut substantially, the courts of appeal will be inundated with multiple hypothetical arguments. Although the judges of the Federal Circuit have consistently decried that kind of appellate advocacy, the Federal Circuit's new and unexpected procedural rule mandates that kind of advocacy.

Consider also *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1947). The plaintiffs claimed that a provision of the Hatch Act was unconstitutional. *Id.* at 81-82. It provided that "no officer or employee in the executive branch of the Federal Government . . . shall take any active part in political

management or in political campaigns." *Id.* at 82. But only one plaintiff had actually violated the provision and the rules promulgated under it. *Id.* at 91 – 92. As to the plaintiffs who had not been charged with violations, the Supreme Court found the issues not ripe for adjudication:

> A hypothetical threat is not enough. We can only speculate as to the kinds of political activity the appellants desire to engage in or as to the contents of their proposed public statements or the circumstances of their publication . . . . Should the courts seek to expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues, they would become the organ of political theories.

Id. at 90–91

At the time of *Tronzo I*, any constitutional argument based on the ratio of punitive damages to the ultimate award of compensatory damages was hypothetical. The factual issues that would make the claim ripe did not yet exist (and might not ever exist, depending on what happened at the hearing). The litigants and the court of appeals could "only speculate at to the kinds" of punitive damage ratios that might be unconstitutional, in light of what the district court might do, after a new hearing. See *id.* 90. Article III courts may not "expand their power so as to bring under their jurisdiction ill-defined controversies over constitutional issues." *Id.* at 89–91.[14]

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[14] In light of the holdings in cases like *Mitchell* and *Boyd*, there is also the risk that a court might impose sanctions for a frivolous motion on a litigant who asked an appellate court, at the time of *Tronzo I*, to rule on the constitutionality of a hypothetical ratio between the punitives and the compensatories before the trial court even held a hearing to decide what the compensatories might be.

CONCLUSION

Respondent argues that it is appropriate for an appellate court to hold that "a finding of tort liability alone is sufficient to support an award of punitive damages, even in the absence of nominal or compensatory damages," and also that "it has become accepted practice in the Eleventh Circuit, in cases applying Florida law, to affirm an award of punitive damages along with affirming tort liability, without regard to the amount of compensatory damages to be awarded on remand."[15] We know that this practice now exists in the Federal Circuit. If it exists elsewhere, it pays no heed to the due process principle articulated in *BMW* and its progeny.

For that reason alone, as well as the foregoing reasons, *Amici Curiae*, Former Past Presidents of the Federal Circuit Bar Association, respectfully request that this Court grant the Petition for Writ of Certiorari, so that courts no longer affirm an award of punitives "without regard to the amount of compensatory damages to be awarded on remand."

Respectfully submitted,

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[15] Response of Plaintiff-Appellant to Defendant-Appellee's Petition for Rehearing, *Tronzo II*, at 9-10 (emphasis in original).